



By FOIA Online and Certified Mail, Return Receipt Requested

March 14, 2017

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667

<https://foiaonline.regulations.gov/foia/action/public/home>

Re: Freedom of Information Act Request Concerning Settling, Rescinding, or Withdrawing the “Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act for the Pebble Deposit Area in Southwest Alaska” and/or the “Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska”

Dear FOIA Officer:

On behalf of the Natural Resources Defense Council (“NRDC”), I write to request the disclosure of records pursuant to the Freedom of Information Act 5 U.S.C. § 522 (“FOIA”) and the pertinent U.S. Environmental Protection Agency (“EPA”) regulations 40 C.F.R. § 2.100 *et seq.* I also request that your agency waive all applicable FOIA fees and/or costs involved in fulfilling this request, as discussed below.

I. Description of Records Sought

NRDC requests all records related to settling, rescinding, and/or withdrawing the Proposed Determination to restrict the Pebble Deposit Area in Southwest Alaska (“Proposed Determination”) issued by EPA Region 10 in July 2014 pursuant to Section 404(c) of the Clean Water Act (33 U.S.C. § 1344(c)). *See* EPA, Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act for the Pebble Deposit Area in Southwest Alaska (2014), *available at* <https://www.epa.gov/bristolbay/proposed-determination-pursuant-section-404c-clean-water-act-pebble-deposit-area>; *see also* 79 Fed. Reg. 42314 (July 21, 2014) (restricting the use of certain waters in the South Fork Kaktuli River, North Fork Kaktuli River, and Upper Talarik Creek watersheds in southwest Alaska as disposal sites for dredged or fill material associated with mining the Pebble deposit, a copper-, gold-, and molybdenum-bearing ore body). NRDC further requests all records related to settling, rescinding, and/or withdrawing the Bristol Bay Watershed Assessment (“Watershed Assessment”). *See* EPA, An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska, Final Report (2014), *available at* <http://cfpub.epa.gov/ncea/bristolbay/recordisplay.cfm?deid=253500#Download>.

NATURAL RESOURCES DEFENSE COUNCIL

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Without limiting the generality of the foregoing, NRDC specifically requests the production of the following types of records in EPA's possession, custody or control:

- 1) Any and all records, documentation, internal and external communications, phone logs, schedules and/or meetings between EPA and Members of Congress, including any representatives or staff, concerning or informing the potential rescission or withdrawal of the Proposed Determination and/or Watershed Assessment made on or after November 8, 2016.
- 2) Any and all records, documentation, internal and external communications, phone logs, schedules and/or meetings between EPA and the Pebble Limited Partnership, Northern Dynasty Minerals, and/or its officers and directors concerning or informing the potential rescission or withdrawal of the Proposed Determination and/or Watershed Assessment made on or after November 8, 2016.
- 3) Any and all records, documentation, internal and external communications, phone logs, schedules and/or meetings between EPA and the U.S. Department of Justice concerning or informing the potential rescission or withdrawal of the Proposed Determination and/or Watershed Assessment made on or after November 8, 2016.
- 4) Any and all records or communications from the Trump Administration, the Trump transition team, and/or "beachhead" units concerning or informing the potential rescission or withdrawal of the Proposed Determination and/or Watershed Assessment.
- 5) Any and all records or communications from the Trump Administration, the Trump transition team, and/or "beachhead" units concerning or informing EPA use of Section 404(c) of the Clean Water Act and/or the permitting process for the proposed Pebble Mine.
- 6) Any and all records, documentation, internal and external communications, phone logs, schedules and/or meetings between EPA and the U.S. Army Corps of Engineers regarding the proposed Pebble Mine, Bristol Bay, Alaska, and/or EPA's use of 404(c) with regard to disposals at the Pebble Deposit Area made on or after November 8, 2016.
- 7) Any and all records, documentation, internal and external communications, phone logs, schedules and/or meetings regarding the Proposed Determination, Watershed Assessment, agency use of Section 404(c), and/or the proposed Pebble Mine, including but not limited to, records and communications from the following individuals and entities:
 - a. Administrator Scott Pruitt
 - b. David Schnare
 - c. Justin Schwab
 - d. Ryan Jackson
 - e. Samantha Dravis
 - f. Bryon Brown
 - g. Alex Hass

In sum, NRDC requests any and all records related to settling, rescinding and/or withdrawing either the Proposed Determination or Watershed Assessment made on or after November 8, 2016.

Please note that in this request, the term “records” means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, social media posts, text messages, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters and Region 10.

Also note that this request specifically seeks responsive records in or on the personal computers, cellphones or other devices, or personal email accounts used by EPA staff if used for any government purpose.

II. Request for a Fee Waiver

NRDC requests that your agency waive the fee that it would otherwise charge for completion of this FOIA request. Disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” and is “not primarily in the commercial interest of the requestor,” pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l).

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

First, the records requested here relate to the EPA’s Proposed Determination and Watershed Assessment. This request seeks information about EPA’s potential rescission or withdrawal of that Proposed Determination and/or Watershed Assessment, including the agency’s future use of its authority under Section 404(c) of the Clean Water Act. The requested records thus the subject of the requested records “concerns ‘the operations or activities of the government.’” 40 C.F.R. § 2.107(l)(2)(i).

Second, the disclosure is “‘likely to contribute’ to an understanding of government activities and operations,” because it directly concerns EPA’s decision to move forward or withdraw its Proposed Determination, as well as the agency’s Watershed Assessment, and will provide information that is not already in the public domain, such as instructions regarding the future use of Section 404(c). 40 C.F.R. § 2.107(l)(2)(ii). *See also Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108 (2004) (organization’s entitlement to a waiver of fees depends upon whether requested materials were publicly available).

The public does not currently possess any information regarding whether EPA will move forward or withdraw its Proposed Determination, including communications with outside parties about that determination. There is more than a reasonable likelihood that these records have informative value to the public, *see Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006). EPA itself believes that the Proposed Determination and Watershed Assessment has informative value, having posted it on the agency's website and in the Federal Register, as well as hosting numerous public hearings regarding both documents.

Third, NRDC's extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are "a broad audience of persons interested in the subject" of EPA's Proposed Determination, Watershed Assessment, and regulatory authority under Section 404(c) of the Clean Water Act. 40 C.F.R. § 2.107(l)(2)(iii). When combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 40 C.F.R. § 2.107(l)(2)(iii). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels, including but not limited to:

- 1) NRDC's website, available at <http://www.nrdc.org>, is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- 2) NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions>.

- 3) NRDC This Week is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter>.
- 4) NRDC updates and maintains several social media accounts: Facebook (565,530 followers), Twitter (195,426 followers), Instagram (37,868 followers), YouTube (19,518 subscribers), and LinkedIn (9,108 followers). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC also issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post; and has more than fifty staff members dedicated to communications work. NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. In addition, NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including the proposed Pebble Mine.

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

Finally, the disclosure is likely to contribute "significantly" to public understanding, as NRDC may analyze and disseminate information from the released records in a communication made to or available to the public. 40 C.F.R. § 2.107(l)(2)(iv). *See also Carney v. Department of Justice*, 19 F.3d 807 (2d Cir. 1994) (requestor's right to fee waiver turns on subject matter of requests and ability of requestor to disseminate information).

The records requested shed light on matters of considerable public interest and concern: EPA's engagement in the future of Bristol Bay. Disclosure would also help the public understand the nature and extent of communications with outside parties about the Proposed Determination and Watershed Assessment.

Public understanding of these topics would be significantly enhanced by disclosure of the requested records.

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. "Congress amended FOIA to ensure that it be 'liberally construed

in favor of waivers for noncommercial requesters.”” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the subject of this request. As noted above, work done by EPA on this topic relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the underlying subject matter.

C. NRDC is a Media Requestor

If EPA finds that NRDC does not meet the first and second requirement above, NRDC is still “a representative of the news media” and therefore entitled to limited fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II), as defined in 40 C.F.R. § 2.107(c)(1)(iii), 40 C.F.R. § 2.107(c)(2)(i)(A), and 40 C.F.R. § 2.107(d)(1). NRDC publishes books and newsletters on issues of current interest to the public through its quarterly magazine, *OnEarth*; publishes newsletters, alerts, and bulletins for its members; issues public reports and analyses; and maintains a website and free online library of reports and analyses. NRDC is therefore a representative of the news media. See generally *Electronic Privacy Info. Ctr. v. United States Department of Defense*, 241 F. Supp. 2d 5, 11-14 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under the FOIA where it publishes books and newsletters on issues of current interest to the public).

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA’s FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. See 40 C.F.R. § 2.107(l)(4). Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please produce the records requested above, preferably by sending them to Taryn Kiekow Heimer via email at tkiekowheimer@nrdc.org. If it is not possible to email, please mail the records requested above to:

Taryn Kiekow Heimer
NRDC
1314 2nd Street
Santa Monica, CA 90401

March 14, 2017

Page 7

Please produce these records on a rolling basis. EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA's has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know. Please do not hesitate to email or call with any questions or to request clarifications.

Thank you in advance for your prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink, reading "Taryn Kiekow Heimer". The signature is fluid and cursive, with the first name "Taryn" being the most prominent.

Taryn Kiekow Heimer
Senior Policy Analyst
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